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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949

NO. 669

REPUBLIC STEEL CORPORATION, Petitioner,

v.

THE FARVAL CORPORATION, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

This is a petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the Sixth Circuit. A transcript of the record, including the proceedings in said court, is furnished herewith in accordance with the rules of this Court.

JURISDICTION.

This Court has jurisdiction by virtue of 28 U.S.C., Sections 1254 and 2101. The judgment sought to be reviewed (R. 421) was entered December 16, 1949, and is final in that it affirms the final judgment of the District Court (R. 406).

SUMMARY STATEMENT.

(1) This is a patent infringement case based on two patents relating to lubricating devices. For convenience they will be called the "Kerns patent" (patent 1,961,051; reproduced at R. 173-7) and the "Dirkes patent" (patent 1,995,342; reproduced at R. 179-83). The case was referred to a Master who filed a report recommending that both patents be adjudged valid and infringed (R. 353-91). The District Court approved and adopted the Master's findings and conclusions (R. 397-406) and entered judgment accordingly (R. 406). The Court of Appeals affirmed without opinion (see R. 422).

(2) Neither patent has been otherwise adjudicated nor, so far as petitioner is aware, is any action pending on either of them. It is therefore improbable that there will ever be a decision as to either patent in any other circuit.

(3) Petitioner challenged the validity of the Kerns patent on the basis of Moore patent 1,562,037. The essential similarity of the two schemes is revealed by a comparison of Moore's drawings (R. 283) with those of Kerns (R. 173). In the following description the reference numerals in Roman type apply to Moore's drawings and those in italic type apply to Kerns' drawings: The problem is to feed oil or grease in measured amounts or "doses" to a bearing or bearings spaced at a distance from the control point. The lubricant is forced by a hand pump (1; *2*) through a feed pipe (20; *20*) to measuring devices (5; *10*) attached to the several bearings which are to be lubricated. When lubricant enters a measuring device through its inlet (10; *19*) it en-

counters a spring-pressed valve (15; *23*). The pump pressure overcomes the normal pressure of the spring (16; *24*) displacing the valve (15; *23*) to the left so as to uncover a passage (12; *21*) and at the same time close a passage (7; *22*). The lubricant thereupon flows through the passage (12; *21*) into the bottom of the main chamber of the measuring device forcing the piston (13; *11*) upwardly to the top of its stroke. The handle (4; *6*) of the pump (1; *2*) is then turned in the reverse direction, relaxing the pressure in the pipe (20; *20*) and permitting the spring (16; *24*) to return the valve (15; *23*) to its original position. In this position the outlet passage (7; *22*) is open and the piston (13; *11*) moves downwardly to discharge the contents of the measuring device to the bearing.

In order to discharge the measuring device there must be some means of applying pressure to the top of the piston (13; *11*). Moore provides a spring 14 for this purpose; Kerns applies pressure from the hand pump through a pipe 14. The use of grease pump pressure to force lubricant out of the measuring device was *per se* old, having been commercially used by respondent as early as 1926 (R. 45) and being disclosed in various expired patents (see, e. g., R. 279, 289).*

The Moore defense was rejected on the ground that Moore's device is inoperative (R. 367, 374, 400). The structural defect of Moore is said to be that the passages 7 and 12 are not properly spaced (R. 157). IT IS CONCEDED, HOWEVER, THAT NOTHING IN THE LANGUAGE OF ANY OF THE KERNS CLAIMS DEFINES AN OPERATIVE VALVE

* The substitution of this old pressure device for Moore's spring 14 in Moore's combination did not create a new combination; see *infra*, p. 13 (footnote).

STRUCTURE TO THE EXCLUSION OF MOORE'S STRUCTURE (R. 164); respondent's principal witness, long experienced in the mechanical arts, said (R. 164) "I don't think that could be done."

(4) The validity of the Dirkes patent was challenged on the basis of patents to Jennings (R. 303), to Barks (R. 307) and to Hillis (R. 331). While each of these patents issued subsequent to the Dirkes patent, each has an earlier filing date; *cf. Alexander Milburn Co. v. Davis-Bournonville Co.*, 270 U. S. 390. It was stipulated that the disclosures appearing in the Jennings, Barks and Hillis patents were contained in their applications when filed (R. 13-14) and it is undisputed that the subject matter of the Dirkes claims in suit is disclosed in each of the three patents (R. 118-24).

The Dirkes patent issued to the respondent as assignee but it appears that the assignment was not made until some years after Dirkes had filed the application in his own behalf on May 16, 1931. In 1931, in an interference declared between the Dirkes application and five other applications, respondent's interests were adverse to Dirkes.

The interference was on a single claim or "count" which ultimately became claim 7 of the Dirkes patent (*cf.* R. 224-5 and R. 183). Claims 6 and 7 of Dirkes are in suit here (R. 13). Claim 6 was not involved in the interference at any time.

Respondent was involved in the interference by reason of its ownership of the Jennings application (R. 224-5, 303, 171). The interference also involved a Hillis application. Respondent acquired the Hillis application and elected to withdraw the Jennings application from

the interference (R. 171), so the net result was that the Patent Office was precluded from determining priority as between Dirkes and Jennings.

The Hillis patent relied on by petitioner issued on a different Hillis application, not involved in the interference*; neither was the application for the Barks patent, here relied on, involved (*cf.* R. 223 and R. 319), so priority was never decided as between Dirkes and either of the applications just referred to.

The skirmishing in the Patent Office resolved the interference into a contest between Dirkes on the one hand and respondent, as the owner of Hillis application No. 451,706, on the other hand. Respondent appears to have contended that the evidence adduced on behalf of Dirkes was inadequate to establish the dates for which Dirkes was contending (R. 240-1) but an "Acting Examiner of Interferences" held in favor of Dirkes (R. 236-41). Respondent thereafter acquired the Dirkes application and the patent in suit was issued to it.

In the trial of the case at bar respondent did not produce Dirkes or any other witness to antedate the Jennings, Barks and Hillis patents. It did not produce a copy of any of the evidence which appears to have been adduced by Dirkes before the Patent Office. Instead it offered as "evidence" over petitioner's objections (R. 150-1, 168-9) a certified copy of the examiner's decision and other documents identifying the subject matter of and the applications involved in the interference.

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* The Hillis application in interference was No. 451,706 (R. 224); the reference Hillis patent issued on application No. 451,707 (R. 335).

The Master held (a) that a Patent Office interference "is a proceeding authorized by law" empowering the Commissioner to issue a patent to the party who is adjudged the prior inventor (R. 376); (b) that the "presumption" in the present case must be that the Patent Office was correct in its decision in the interference (R. 379); (c) that "no proof has been offered by defendant [petitioner] here to overcome the presumption of validity" (R. 380)*; and (d) that

> "In the case presented here no attack is made upon the decision of the Patent Commissioner which resulted in the issuance of the patent. The claim is made by a stranger and fails since the decision or judgment complained of has not been appealed or modified." (R. 380).

The District Court, affirming the Master, held that the "result" of the interference was *prima facie* "evidence" of Dirkes' priority, casting upon petitioner the burden of proving that the Patent Office decision "not only was not binding upon the defendant [petitioner] but that it was not in accordance with the facts" (R. 402). The Court of Appeals affirmed (R. 421-2).

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* Since the Barks, Hillis and Jennings patents were in evidence, the Master presumably meant that petitioner had established no date for them prior to the date accorded to Dirkes in the interference.

QUESTIONS PRESENTED.

1. Where an unexpired patent discloses a mechanical combination broadly disclosed in an expired patent, but the structural details disclosed in the expired patent are such as to make it inoperative, will the unexpired patent be held valid when its claims do not define the structural differences which make the later device operative, or must its claims, to be valid, define that difference?

2. Where a Patent Office examiner has decided as a fact, on the basis of evidence laid before him by an applicant for a patent, that the applicant made his invention at a certain date prior to the filing date of his application and also prior to the filing date of the earlier application of another inventor, is that decision (unsupported by any of the evidence upon which it was based) *per se* evidence of the fact in a subsequent infringement suit against a stranger to the Patent Office proceedings?

3. In the circumstances stated in Question 2 does the language of this Court in *Radio Corporation of America et al. v. Radio Engineering Laboratories, Inc.*, 293 U. S. 1, require adherence to the examiner's finding (despite the absence of any evidence in the infringement suit to support it) until and unless the defendant proves that the decision was not in accordance with the facts?

4. Where the defendant in an action for patent infringement, in accordance with the doctrine of *Alexander Milburn Company v. Davis-Bournonville Company*, 270 U. S. 390, has challenged the validity of the patent in suit by proof that various reference patents disclose

the claimed subject matter and have filing dates earlier than the filing date of the challenged patent, is the *prima facie* anticipation of the reference patents overcome by mere proof of the judgment in a Patent Office proceeding, to which the defendant was a stranger, wherein the patentee of the challenged patent was accorded an invention date earlier than the filing date of any of the reference patents?

5. In the circumstances stated in Question 4, *supra*, can the judgment control in respect of a claim whose priority was not in issue in the Patent Office proceeding?

6. In the circumstances stated in Question 4, *supra*, can the judgment control as against a reference patent which was never involved in any contest of priority with the challenged patent?

7. In the circumstances stated in Question 4, *supra*, can the judgment control as against a reference patent which the suit-plaintiff deliberately withdrew from the Patent Office proceedings and thereby made it impossible for the Patent Office to render judgment of priority in respect of it?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. As to the issue posed by Question 1, *supra*, the decision of the court below is in conflict with the decision of the Court of Appeals for the Fourth Circuit in *Rosemary Manufacturing Co. v. Halifax Cotton Mills, Inc.*, 257 Fed. 321.

2. Question 1, *supra*, is an important question of patent law which has not been, but ought to be, decided by this Court.

3. Questions 2-7, *supra*, are important related questions of patent law which have not been, but ought to be, decided by this Court.

4. As to the issues posed by Questions 2 and 3, *supra*, the decision of the court below is believed to be in conflict with, or to misinterpret and misapply, the decision of this Court in *Radio Corporation of America et al. v. Radio Engineering Laboratories, Inc.*, 293 U. S. 1.

5. As to the issue posed by Question 4, *supra*, the decision of the court below is in conflict with the decision of the Court of Appeals for the Second Circuit in *Messler v. United States Rubber Co.*, 148 F. 2d 734, and with the decision of the Court of Appeals for the Seventh Circuit in *Philadelphia Storage Battery Co. v. Zenith Radio Corporation*, 117 F. 2d 642.

6. As to the issue posed by Question 5, *supra*, the decision of the court below is in conflict with the decision of the Court of Appeals for the Seventh Circuit in *Philadelphia Storage Battery Co. v. Zenith Radio Corporation, supra.*

7. By affirming the action of the District Court in treating the "result" of a Patent Office proceeding (to which petitioner was a stranger) as evidence against petitioner, the Court of Appeals has so far sanctioned such departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, YOUR PETITIONER PRAYS that a Writ of Certiorari be issued out of and under the seal of this Court, directed to the United States Court of Appeals for the Sixth Circuit, commanding the said Court to certify and send to this Court, on a day to be designated, a full transcript of the record and all proceedings of said Court in the case numbered and entitled on its docket Number 10,869, *Republic Steel Corporation, Defendant-Appellant, vs. The Farval Corporation, Plaintiff-Appellee,* to the end that this case may be reviewed and determined by this Court; that the judgment of said Court of Appeals for the Sixth Circuit be reversed; and that petitioner be granted such other and further relief as to this Court may seem meet and proper.

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March, 1950.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below.

The Court of Appeals did not file any opinion (see clerk's certificate, R. 422). The opinion of the District Court is reported at 82 F. Supp. 31.

Jurisdiction.

The petition sets forth at page 2 the grounds upon which the jurisdiction of this Court is invoked.

Statement of the Case.

The petition sets forth at pages 2-8 the statement of the case and the questions presented.

Specification of Errors.

If the petition is granted it will be contended that the court below erred:

(a) In failing to hold as a matter of law that prior art against a patent claim may not be disregarded on the ground of inoperativeness where the claim does not define the structural difference which makes for operativeness;

(b) In failing to hold as a matter of law that a judgment on a question of fact is not *per se* evidence against a stranger and casts no burden upon him to prove it wrong;

(c) In affirming the holding of the District Court that a judgment of an administrative tribunal is *per se*

evidence, against a stranger to the administrative proceeding, of a fact therein stated;

(d) In allowing the administrative judgment to control in respect of a patent claim the priority of which was not in issue in the administrative proceeding;

(e) In allowing the administrative judgment to control as against reference patents which were not in issue in the administrative proceeding; and

(f) In allowing the administrative judgment to control as against a reference patent which respondent withdrew from the administrative proceeding.

Argument.

This petition reveals the existence of two important areas in the field of patent law wherein the decision below, if allowed to stand, materially and adversely affects the public interest; *cf. Precision Instrument Co. v. Automotive Co.*, 324 U. S. 806, 815-6.

1.

In the first area is a question of statutory requirements that the invention be "distinctly" claimed (35 U.S.C. 33); *cf. General Electric Co. v. Wabash Co.*, 304 U. S. 364, 368-9; *Halliburton Co. v. Walker*, 329 U. S. 1, 7-11. In the case at bar the Moore patent (R. 283), which expired in 1942 and whose subject matter and all unpatentable modifications thereof are accordingly in the public domain, has been ignored as prior art against the Kerns patent in suit on the ground that it is inoperative. BUT THE KERNS CLAIMS ADMITTEDLY DO NOT POINT OUT THE STRUCTURAL DIFFERENCE WHICH ALLEGEDLY SPELLS THE DIFFERENCE BETWEEN OPERATIVENESS AND INOPERATIVENESS; to the contrary, respondent's principal

witness intimated that the difference could not be defined by words (*supra*, p. 4); *cf. General Electric Co. v. Wabash Co., supra.*

The vice of such a claim is pointed out in *Rosemary Mfg. Co. v. Halifax Cotton Mills, Inc.*, C.A. 4, 257 Fed. 321, (*supra*, p. 9.) That case was on a Patterson patent which broadly claimed the combination of a Jacquard mechanism with a particular type of loom. The *desirability* of combining these mechanisms had been disclosed sixty-five years earlier in a patent to two British inventors. The court found that the mechanism disclosed by the British patentees "did not work, and their machine does not anticipate" Patterson's, a holding which precisely parallels the holding as to Moore in the case at bar.* In the *Rosemary* case, however, the court held (properly, we submit) that while a patentee who succeeded in making the combination work might have a patent on his *way* of making it workable, he could not claim a monopoly of the combination "however brought about."

The justice of the *Rosemary* decision seems apparent. Any other rule would give the patentee a monopoly broader than his invention. It would give him "broad rights to bar the use of all devices now or hereafter known" which work, while allowing him conveniently

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* The mere fact that Kerns also substituted a fluid pressure pipe, *per se* old, for Moore's spring 14 is of no moment in view of the prohibition against repatenting an exhausted combination; *Bassick Mfg. Co. v. Hollingshead Co.*, 298 U. S. 415; *Lincoln Engineering Co. v. Stewart-Warner Corp.*, 303 U. S. 545. Its inclusion in the Kerns claims does not change the essential fact that the primary basis for ignoring Moore was its inoperativeness.

to ignore, as prior art, devices exhibiting the same principle but unworkable because of some feature not defined by the patentee; *cf. Halliburton Co. v. Walker, supra,* at p. 13. It would countenance a patent claim which enables the patentee to "fire away" at each new device "calculating to 'hit it if it is a deer, and miss it if it is a cow' "; *Matheson v. Campbell,* C.A. 2, 78 Fed. 910, 915.

2.

In the second area are questions as to the advantage that a patentee may obtain against the public generally from a Patent Office judgment between particular parties:

(a) In the courts below respondent successfully urged that the decision of this Court in *Radio Corp. v. Radio Laboratories,* 293 U.S. 1, compelled adherence to the Patent Office judgment despite the facts (*i*) that petitioner was a stranger to the Patent Office proceeding and (*ii*) respondent did not offer a shred of evidence upon which a finding of fact as to Dirkes' invention date could be made. It is submitted that this was a misinterpretation of the decision in the *Radio* case which should be corrected by this Court.

(b) In *Messler v. United States Rubber Co.,* C.A. 2, 148 F. 2d 734 (*supra,* p. 9)* the patentee Messler had originally been refused a patent in view of an earlier patent to one Cort. Messler thereupon filed an affidavit under Patent Office Rule 75 (35 U.S.C.A., p. 724) asserting that he had made the invention prior to Cort's filing date and attaching an early specimen of his device. The Messler patent was thereupon granted.

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* Certiorari was denied; 326 U.S. 717.

In the subsequent infringement suit against United States Rubber Company the Cort patent was involved as prior art under the *Milburn-Davis* doctrine (*supra*, p. 4, p. 7). The court held that proof of the Cort patent cast upon Messler the burden of antedating it and specifically rejected the contention that because of the proceedings in the Patent Office the burden of overcoming the showing that Messler had made in the Patent Office was on the defendant.

While an affidavit under Patent Office Rule 75 is not the same as an interference proceeding, they are alike in respect of all matters that are material here. In each case the grant of a patent to the junior applicant flows from the fact that the Patent Office was satisfied that the junior applicant had made his invention prior to the earlier filing date of another inventor; in each case a patent issues despite the *prima facie* evidence of the other inventor's earlier filing date. In a suit against a stranger to the Patent Office proceedings there would be no logic or reason to the proposition that the "presumption of validity" attaching to the grant includes a presumption that the date of invention is the one sworn to by the applicant in an interference proceeding (as in the case at bar) but not the date sworn to by him in a proceeding under Patent Office Rule 75 (as in the *Messler* case).

(c) In the case at bar the Patent Office judgment has been invoked against a stranger to the Patent Office proceedings. But in the Seventh Circuit, *and in the Patent Office,* the rule is that the judgment is not even binding as between the interfering parties, in a second proceeding involving a stranger to the first interference, and has no weight whatever, so far as the stranger is concerned; *Philadelphia Storage Battery Co. v. Zenith Radio Corp.,* 117 F. 2d 642 (*supra,* p. 9). That case

was an action under Section 4915 R. S., 35 U.S.C. 63, providing for suits to obtain patents after adverse decisions by the Patent Office. The rights of three inventors—Heath, Jacke and Butler—were involved. There had been an interference between Jacke and Heath and although Heath was the senior party, Jacke's evidence had satisfied the Patent Office of his priority over Heath. A second interference in respect of other claims in the Jacke and Heath applications was declared, this one also including the application of Butler. No testimony was taken in this latter interference. Jacke contended that the judgment in the first interference was *res judicata* but that contention was rejected both by the Patent Office and by the courts. The Court of Appeals also held that since Butler had not been a party to the first interference "he was not bound, and could not be, by the finding" therein and that Jacke's failure or refusal to retake the evidence was fatal, even as against Heath, although Butler lost on other grounds.

The justice of the Seventh Circuit rule seems apparent. When Jacke pinned his reliance on the judgment he had obtained against Heath in the first interference he deprived Butler of the right and opportunity to cross examine the witnesses or even make an argument as to the shortcomings of the evidence in the first interference. Similarly, in the case at bar, petitioner has been deprived of the opportunity to cross examine Dirkes,* or even to see the evidence which was before the Patent Office and point out its shortcomings. The

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* It is perhaps significant that respondent appears to have urged in the Patent Office that Dirkes' evidence was biased and in any event "was insufficient to establish reduction to practice * * *." (R. 240, 241).

importance of these rights appears from the decision in the *Philadelphia Storage Battery* case (p. 644): In the first interference Heath had filed no brief and made no argument and the decision was in Jacke's favor but in the second interference Heath did brief and argue the matter, with the result that, contrary to the decision in the first interference, the Examiner became "thoroughly convinced that Heath was entitled to priority."

The abuses of the patent privilege which would flow from any relaxation of the right of every defendant to cross examine and to scrutinize the patentee's evidence of priority are obvious.

(d) Attention has been called to the fact that claim 6 of the Dirkes patent was not involved in the interference (*supra,* p. 4). Despite this, the decision below awards priority to Dirkes over Barks, Jennings and Hillis in respect of claim 6. The decision is in conflict with the decision of the Seventh Circuit in the *Philadelphia Storage Battery* case, *supra,* on this point.

(e) Although petitioner was a stranger to the Patent Office proceeding, the Master virtually made the Patent Office judgment *res judicata* when he held that the defense "fails since the decision or judgment complained of has not been appealed or modified" (*supra,* p. 6). The decisions below do not invoke the doctrine of *stare decisis* and, in any event, that doctrine applies only when the *evidence* in the second action is substantially the same; *Radio Corp. v. Radio Laboratories,* 293 U. S. 1, 8. The effect of the decision below is to attribute to the action of the Patent Office the quality of a judgment *in rem; cf. Triplett v. Lowell,* 297 U. S. 638, 642.

3.

In view of the conflict of circuits, the importance of the questions presented, and the prejudice to the public and the undue broadening of patent rights if the judgment below is permitted to stand, it is submitted that certiorari should be granted.

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